Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Application by Bell Atlantic New York for	)	
Authorization Under Section 271 of the	)	CC Docket No. 99-295
Communications Act To Provide In-Region,	)	
InterLATA Service in the State of New York	)	
	)	
	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: December 21, 1999 **Released:** December 22, 1999

By the Commission: Chairman Kennard and Commissioners Ness and Powell issuing separate statements; Commissioner Furchtgott-Roth concurring and issuing a statement.

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I. INTRODUCTION AND OVERVIEW

1. In this Order, we grant Bell Atlantic's application to enter the interLATA long distance market in New York State based on our conclusion that Bell Atlantic has taken the statutorily required steps to open its local exchange and exchange access markets to competition. The market opening actions by the New York Commission and Bell Atlantic underlying our decision bring the telecommunications industry one step closer to realization of the full pro-competitive goals of the 1996 Telecommunications Act,[1] and promise substantial benefits for consumers in the form of lower rates and innovative service packages. Bell Atlantic filed the

[1] The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). We refer to the Communications Act of 1934, as amended, as "the Communications Act" or "the Act." We refer to the Telecommunications Act of 1996 as "the 1996 Act."

application addressed in this Order with the Commission on September 29, 1999. Fifty-seven parties filed comments on the application on October 18, 1999. Of these, more than twenty parties supported grant of the application. Twenty-five parties filed reply comments on November 8, 1999.[2]

2. Our decision today approving Bell Atlantic's application represents the culmination of extensive federal and state efforts implementing the Telecommunications Act of 1996. This action builds on the experience that this Commission has gained from reviewing prior section 271 applications and developing rules to implement section 251 of the Communications Act. Significantly, it also builds on the tireless efforts of the New York Commission, which has worked long and hard with Bell Atlantic and competitive local exchange companies (LECs) to ensure that local markets in New York are open to competition.

3. In enacting the telephony provisions of the 1996 Act, Congress envisioned fundamental pro-competitive changes in the then-existing telecommunications environment. To this end, Congress took the momentous step of requiring that the incumbent LECs open the traditionally non-competitive local exchange and exchange access markets to competition in order to foster the entry of alternative service providers. Once the Bell Operating Companies (BOCs) have opened their local markets to competition, the 1996 Act permits them to enter the in-region, interLATA toll market, thereby increasing competition in the long distance telecommunications market.

4. Unfortunately, implementation of this congressional vision of increased telecommunications competition has, in many instances, not proceeded swiftly or smoothly. For example, some of the section 271 applications that we have reviewed to date have fallen far short of the statutory requirements. Moreover, some carriers attacked sections 271-275 of the Act on constitutional grounds arguing that each constitutes an impermissible bill of attainder.[3] The court roundly rejected this challenge, stating that these provisions "are constitutionally sound."[4] We believe that the instant application represents a turning point in the process of implementing the 1996 Act, with a new focus by the BOCs on taking the steps necessary to open the local exchange and exchange access markets to competition.

5. While this is the first section 271 application to receive Commission approval, our decision here reflects the fundamental principles adopted in our prior section 271 orders. Thus, we apply the general standards developed in prior orders in evaluating section 271 compliance – whether the BOC is providing service to competitors at parity with its retail offerings or, when there is no analogous retail activity, whether the BOC's performance would allow an efficient competitor a meaningful opportunity to compete. Based on our growing experience in addressing issues involving the development of local exchange competition, we also apply these standards in a pragmatic fashion, thus building on our prior decisions. For example, we consider the overall picture presented by the record, rather than focusing on any one aspect of performance.

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[2] A list of the parties filing comments, replies and/or *ex partes* in this proceeding is contained in Appendix A.

[3] *SBC Communications, Inc. v. FCC*, 154 F.3d 226 (5th Cir. 1998).

[4] *Id.* at 244.

6. It is no coincidence that this historic first is recorded in New York, a state that has been a leader in opening local markets to competition for over fifteen years,[5] and a state with one of the most rigorous, expert commissions in the nation. Without the dedicated work and unfailing persistence of the New York Commission over the past several years, it is unlikely that this application would have reached a point at which it merits approval.[6] It is also noteworthy that New York State has some of the most intensely competitive local exchange and exchange access markets in the nation. This track record of successful competition places the present application in a different context from prior filings. For the first time, we can evaluate compliance with the requirements of section 271 in a market context, rather than relying solely on predictive judgment.

7. We applaud the dedicated efforts of the New York Commission, beginning shortly after passage of the 1996 Act, to work with Bell Atlantic and competitive LECs to ensure that Bell Atlantic would achieve compliance with section 271.[7] A number of the parties to this proceeding also praise the work of the New York Commission.[8] Even AT&T, which strongly

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[5] The New York Commission has pioneered measures to open the local exchange market to competition, beginning with its decision in 1985 authorizing Teleport Communications (Teleport) to compete with the New York Telephone Company (the predecessor of Bell Atlantic in New York) in providing local exchange private line services. For example, in 1989, the New York Commission was the first to require an incumbent LEC to provide competitors with a form of central office interconnection (later known as virtual collocation) for the provision of private line services. *Opinion and Order Adopting Regulations Concerning Common Carriage,* Case 89-C-099 (NYPSC Feb. 20, 1989). In 1991, the New York Commission was also the first to provide for "physical collocation" for the provision of private line services. Cases 29469 and 88-C-004, *Order Regarding OTIS II Compliance Filing*, Issued and effective May 1991. The New York Commission subsequently expanded its physical and virtual collocation requirements to include switched services. *Opinion and Order on Pooling, Collocation and Access Rate Design,* Opinion No. 92-13, Case 28425 (NYPSC May 29, 1992). *See also Expanded Interconnection with Local Telephone Company Facilities,* Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369, 7374-75 (1991). In addition, the New York Commission ordered loop unbundling for centrex and private branch exchange (PBX) services. *Opinion and Order Concerning Comparably Efficient Interconnection Arrangements and Instituting Proceeding*, Opinion No. 91-24, Cases 88-C-004, 88-C-063 and 91-C-1174 (NYPSC Nov. 25, 1991). In 1993, the New York Commission also became the first to authorize local exchange service competition, providing for the negotiation of carrier-to-carrier interconnection agreements between Bell Atlantic and competitive LECs, with mediation and arbitration if necessary. *Proceeding on Motion of the Commission to Investigate Performance-Based Incentive Regulatory Plans for New York Telephone Company,* Case 92-C-0665 (NYPSC 1993). This decision resulted in Bell Atlantic issuing NXX codes to competitors (Teleport and Metropolitan Fiber Systems), a vital step in the development of local competition. The New York Commission has continued to encourage and strengthen the competitive marketplace for local service. *See, e.g., Order Considering Loop Resale and Ports Pricing,* Case 95-C-0657, *et al,* (NYPSC Nov. 1, 1995) (requiring NYNEX to offer discount to resellers for residential service); *Opinion and Order Adopting Regulatory Framework,* Opinion No. 96-13, Case 94-C-0095 (NYPSC May 22, 1996) (adopting broad framework to encourage rapid transition to competition for local service).

[6] Once this Commission has approved the first section 271 application, other applicants will have a model to follow in preparing their applications, making the proceedings at the state level less difficult.

[7] At the time, New York Telephone was a subsidiary of NYNEX Corporation. NYNEX was subsequently acquired by Bell Atlantic. For convenience and clarity we will refer to the entity as Bell Atlantic throughout this Order.

[8] *See, e.g.,* AT&T Comments at 1-2; CoreComm Comments at 1; Excel Comments at 1-2; Nextlink Comments at 2. *See also* MCI WorldCom Comments at 1.

opposes the application, agrees that the New York Commission has significantly advanced Bell Atlantic's progress toward compliance with section 271.[9] MCI states that "[a]t the insistence of the New York State Public Service Commission . . . BA-NY has done much to open its local markets . . . "[10] Nextlink, one of the competitors supporting the application, also cites with approval the "open, collaborative process that included independent third party testing, numerous industry workshops, and staff solicitation and review of detailed public comments."[11]

8. The section 271 process in New York exemplifies the way in which rigorous state proceedings can contribute to the success of a section 271 application. There are a number of elements that were particularly important to the success of this process in opening local markets to competition consistent with the terms of the 1996 Act. These include: (1) full and open participation by all interested parties; (2) extensive independent third party testing of Bell Atlantic's operations support systems (OSS)[12] offering; (3) development of clearly defined performance measures and standards; and (4) adoption of performance assurance measures that create a strong financial incentive for post-entry compliance with the section 271checklist by Bell Atlantic. While we accord applicants flexibility in demonstrating compliance with section 271, these elements played a vital role in the success of this application.

9. First, under the auspices of the New York Commission, both competitive LECs and Bell Atlantic participated fully in collaborative sessions and technical workshops to clarify or resolve issues. This ensured broad-based industry participation throughout the proceeding.

10. Second, extensive third party testing of Bell Atlantic's OSS in New York was also critical to the success of these proceedings. The OSS testing was conducted in two phases. Phase I consisted of development of a detailed and comprehensive plan to evaluate and test the OSS interfaces and the adequacy of Bell Atlantic's processes, procedures, and documentation to allow competitive LECs to access and use these systems.[13] Phase II of the test involved: (1) building the interface and assessing the ease or complexity of developing interface software; and (2) executing the test plan using a pseudo-competitive LEC.[14] The rigorous, comprehensive third party testing in New York identified numerous shortcomings in Bell Atlantic's OSS performance that were subsequently corrected and re-tested. KPMG released its final report on August 6,

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[9] AT&T Comments at 1-2.

[10] MCI WorldCom Comments at 1.

[11] Nextlink Comments at 2.

[12] OSS refers collectively to the systems, databases, and personnel used by incumbent LECs to provide services to customers in an accurate and timely manner as well as to ensure the quality of those services. Nondiscriminatory access to OSS is essential if competetive LECs are to be able to compete effectively with incumbent LECs. *See infra* Section V.B.

[13] New York Commission Comments at 9-11.

[14] *Id.* KPMG Peat Marwick (KPMG) was selected as the pseudo-competitive LEC, and Hewlett Packard was hired to build the interface between KPMG and Bell Atlantic. *Id. See also* New York Commission Comments at 33.

1999, concluding that Bell Atlantic's OSS was commercially available and sufficient to handle reasonable, anticipated commercial volumes.[15]

11. Third, the New York Commission developed, and continues to refine, inter-carrier performance measures and service quality standards in its Carrier-to-Carrier proceeding.[16] For example, the New York Commission has instituted collaborative proceedings to address xDSL issues and is developing xDSL specific performance measures and standards.[17] This effort represents an ongoing process as a number of additional standards remain under development. To ensure that the company's performance data or "metrics" are reported reliably in accordance with the New York Commission's definitions, New York staff and KPMG reviewed the adequacy of internal controls surrounding the data collection process. In addition, the New York Commission's staff verifies on a monthly basis that Bell Atlantic's reported results conform to the definitions developed in the Carrier-to-Carrier proceeding.[18] The definitions and standards developed in that proceeding have done much to foster the development of consistent and meaningful data concerning Bell Atlantic's performance. This gives us greater confidence that our decision is based on performance data that accurately measures Bell Atlantic's actual performance.

12. Fourth, the New York Commission has adopted Bell Atlantic's proposal for self-effectuating performance assurance plans that will provide significant financial incentives for Bell Atlantic to maintain an open market and prevent "backsliding" in the future provision of service by Bell Atlantic to competitive LECs. It is important that these plans are designed to function automatically without imposing administrative and regulatory burdens on competitors. It is also significant that the New York Commission is committed to supervising the implementation of these plans.

13. The well established pro-competitive regulatory environment in New York in conjunction with recent measures to achieve section 271 compliance has, in general, created a thriving market for the provision of local exchange and exchange access service. Competitors in New York are able to enter the local market using all three entry paths provided under the Act.[19] These new entrants are serving both residential and business customers in geographic areas throughout the state, although competition is most intense for business customers in urban areas, especially in New York City.[20] As a result, the extent of competition in New York greatly

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[15] Bell Atlantic Application App. C, Tab 916, Bell Atlantic OSS Evaluation Project Final Report submitted by KPNG (Aug. 6, 1999) (KPMG Final Report).

[16] *Order Adopting Inter-Carrier Service Quality Guidelines*, Case 97-C-0139 (NYPSC Feb. 16, 1999) (Bell Atlantic Application App. E, Tab 61) (*NYPSC Guidelines Order*); *Order Estabilshing Permanent Rule*, Case 97-C-0139 (NYPSC Jun. 30, 1999) (Bell Atlantic Application App. E, Tab 83) (*NYPSC Permanent Rule Order*).

[17] See New York Commission Comments at 92-95; New York Commission Reply at 31-35.

[18] New York Commission Comments at 12, App. A.

[19] Bell Atlantic Application Taylor Decl. Attach. A at paras. 1, 27.

[20] *Id.* at para 1.

exceeds that in the other states for which BOCs have filed section 271 applications.[21]

14. Bell Atlantic estimates that competitors serve at least 1,118,180 lines in New York.[22] According to Bell Atlantic, competitors serve at least 651,793 lines using their own facilities, 152,055 lines using the UNE platform,[23] and 314,332 lines through resale. Bell Atlantic states that competitive LECs serve both residential and business customers.[24] Bell Atlantic estimates that competitors in New York serve at least 35,753 residential lines over their own facilities.[25] In addition, Bell Atlantic estimates that competitive LECs in New York provide service to 137,342 residential customers using the UNE platform and resell another 63,547 residential lines.[26] Similarly, Bell Atlantic estimates that competitive LECs in New York serve at least 612,000 business customers over their own facilities.[27] Competitive LECs serve an additional 14,713 business lines using the UNE platform and resell another 250,785 business lines.[28]

15. Our action today clearly demonstrates that when a BOC takes the steps required to open its local markets to full competition, the company will be rewarded with section 271 authority to enter the long distance market. The market opening requirements of the 1996 Act demand substantial changes in the way the BOCs have historically done business, and opening the New York market to full local competition has not been an easy process for Bell Atlantic or the New York Commission. We commend their hard work in reaching this historic achievement.

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[21] For example, in its second section 271 application for Louisiana, BellSouth stated that it had provisioned 107 UNE loops in Louisiana whereas Bell Atlantic had provided nearly 200,000 UNE loops as of July 1999. *Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, Inter-LATA Services in Louisiana*, CC Docket No. 98-121. Memorandum Opinion and Order, 13 FCC Rcd 20599, at 20715 (1998) (*Second BellSouth Louisiana Order*; Bell Atlantic Application at 15, Bell Atlantic Lacouture/Troy Decl. at para. 66. Moreover, BellSouth was not providing the UNE platform while Bell Atlantic has provided more than 150,000 loops as part of the UNE-platform as of August 1999. Bell Atlantic Application at 15; Bell Atlantic Lacouture/Troy Decl. at para. 66.

[22] Bell Atlantic Taylor Decl. Attach A at para.1. Because competitive LECs are not required to report this information, complete counts of the number of lines served by competitors are not available. We note, however, that no commenters disputed Bell Atlantic's estimates suggesting that these figures are well within the zone of reasonableness.

[23] The UNE-platform is a combination of unbundled elements composed of loops, switching, and transport.

[24] Bell Atlantic Taylor Decl. Attach. A at para. 1. According to Bell Atlantic, this has been the case in New York for some time. Bell Atlantic asserts that, by October 1997, competitive LECs were serving at least 19,357 residential customers (3,438 facilities-based, 15,919 resale) and 216,637 business customers (151,135 facilities based, 65,502 resale). *Id.* at 2 n.2.

[25] *Id.* at para. 1. This estimate is based on the number of E911 listings competitors have obtained. *Id.* at para. 2.

[26] *Id.*

[27] *Id.*.

[28] *Id.* at para 1.

16. Finally, we wish to emphasize that grant of this application may close this chapter of the proceeding, but it is not the end of the story. Bell Atlantic must continue to comply with the checklist requirements, and with the requirements of section 272 of the Act. Section 271(d)(6) provides specific tools that augment our preexisting enforcement authority, to be used if Bell Atlantic falls out of compliance with the conditions required for grant of its application. Most notably, section 271(d)(6) authorizes the Commission to suspend or revoke the authorization granted here. This is a powerful enforcement tool, which should create a strong incentive for Bell Atlantic to ensure that its performance does not diminish. We expect that Bell Atlantic will not risk facing the severe remedy of having its authority to market service suspended, but stress that we are prepared to use this remedy if Bell Atlantic's performance in implementing the checklist deteriorates.

II. BACKGROUND

A. Statutory Framework

17. In the 1996 Act, Congress conditioned BOC provision of in-region, interLATA service on compliance with certain provisions of section 271.[29] Pursuant to section 271, BOCs must apply to this Commission for authorization to provide interLATA services originating in any in-region state.[30] Congress has directed the Commission to issue a written determination on each application no later than 90 days after the application is filed.[31]

18. To obtain authorization to provide in-region, interLATA services under section 271, the BOC must show that: (1) it satisfies the requirements of either section 271(c)(1)(A), known as "Track A" or 271(c)(1)(B), known as "Track B"; (2) it has "fully implemented the competitive checklist" or that the statements approved by the state under section 252 satisfy the competitive checklist contained in section 271(c)(2)(B);[32] (3) the requested authorization will be carried out in accordance with the requirements of section 272;[33] and (4) the BOC's entry into in-

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[29] We note here that, for the provision of international services, a U.S. carrier must separately receive section 214 authorization from the Commission. *See* 47 U.S.C. § 214; *see also Streamlining the International Section 214 Authorization Process and Tariff Requirements*, Report and Order, 11 FCC Rcd 12884 (1996); *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, Report and Order and Order on Reconsideration, 12 FCC Rcd 23891 (1997), recon. pending. This requirement applies notwithstanding a BOC's approval under section 271 for the provision of in-region, interLATA service originating in a particular state.

[30] *See* 47 U.S.C. § 271.

[31] *Id.* § 271(d)(3).

[32] *Id.* § 271(d)(3)(A). The critical, market-opening provisions of section 251 are incorporated into the competitive checklist found in section 271. See 47 U.S.C. § 251; *see also Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, 11 FCC Rcd 15499 (1996) (*Local Competition First Report and Order*), aff'd in part and vacated in part sub nom., *Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) and *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), aff'd in part and remanded, *AT&T v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999).

[33] 47 U.S.C. § 271(d)(3)(B).

region, interLATA market is "consistent with the public interest, convenience, and necessity."[34] The statute specifies that unless the Commission finds that these four criteria have been satisfied, the Commission "shall not approve" the requested authorization.[35]

19. Section 271(d)(2)(A) requires the Commission to consult with the Attorney General before making any determination approving or denying a section 271 application. The Attorney General is entitled to evaluate the application "using any standard the Attorney General considers appropriate," and the Commission is required to "give substantial weight to the Attorney General's evaluation."[36] Section 271(d)(2)(A) specifically provides, however, that "such evaluation shall not have any preclusive effect on any Commission decision."[37] Thus, Congress clearly contemplated that, in some circumstances, the Commission could reach a different conclusion from the Department, even after giving "substantial weight" to the Department's views.

20. In addition, the Commission must consult with the relevant state commission to verify that the BOC has one or more state approved interconnection agreements with a facilities-based competitor, or a statement of generally available terms and conditions (SGAT), and that either the agreement(s) or general statement satisfy the "competitive checklist."[38] In the *Ameritech Michigan Order*, the Commission determined that, because the Act does not prescribe any standard for Commission consideration of a state commission's verification under section 271(d)(2)(B), it has discretion in each section 271 proceeding to determine the amount of weight to accord to the state commission's verification.[39] The Commission has held that, although it will consider carefully state determinations of fact that are supported by a detailed and extensive record, it is the Commission's role to determine whether the factual record supports the conclusion that particular requirements of section 271 have been met.[40] In the instant proceeding, we accord the New York Commission's evaluation substantial weight, for the reasons set forth above.[41] In particular, we note that the New York Commission has directed a rigorous collaborative process that has included: an extensive independent third-party test of Bell Atlantic's OSS interfaces, processes and procedures; active participation by New York

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34 *Id.* § 271(d)(3)(C).

35 *Id.* § 271(d)(3). *See SBC Communications, Inc. v. FCC*, 138 F.3d 410, 413, 416 (D.C. Cir. 1998).

36 47 U.S.C. § 271(d)(2)(A).

37 *Id.*

38 47 U.S.C. § 271(d)(2)(B).

39 *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan*, CC Docket No. 97-137, 12 FCC Rcd 20543, 20559-60 (1997) (*Ameritech Michigan Order*). As the Court of Appeals for the D.C. Circuit has held, "[A]lthough the Commission must consult with the state commissions, the statute does not require the Commission to give State Commissions' views any particular weight." *SBC Communications v. FCC*, 138 F.3d at 416.

40 *Ameritech Michigan Order*, 12 FCC Rcd at 20560; *SBC Communications v. FCC*, 138 F.3d at 416-17.

41 *See supra* at paras. 6-13.

Commission staff, Bell Atlantic, and competitive LECs in numerous technical conferences that helped to identify and resolve problems; and the development of a comprehensive performance monitoring and enforcement mechanism. Throughout these proceedings, the New York Commission has ensured that the process was open to participation by all interested parties and, as a result, received and reviewed a massive record of public comments. We thus place substantial weight on the New York Commission's conclusions, as they reflect its role not only as a driving force behind these proceedings, but also as an active participant in bringing local competition to the state's markets.

B. History of this Application

21. On February 13, 1997, Bell Atlantic, filed a draft application under section 271, along with a Statement of Generally Applicable Terms and Conditions with the New York Commission.[42] On July 8, 1997, after a number of technical conferences and collaborative meetings and technical and legal analyses,[43] a New York Commission Administrative Law Judge concluded that Bell Atlantic had made a *prima facie* case regarding certain offerings, but had not met its burden of proof regarding commercial availability, procedure standardization, timeliness, and measuring parity.[44] Subsequently, the New York Commission held additional collaborative sessions to work out technical details associated with development of a working Operations Support System (OSS).[45] Specifically, these sessions resolved numerous OSS issues, including an agreement on business rules that would govern the development by competitors of systems to interface with those of Bell Atlantic.[46] Following approval of the Bell Atlantic/NYNEX merger, Bell Atlantic filed a supplemental section 271 application with the New York Commission, which was followed by additional filings and technical conferences.[47] After completion of this process, Bell Atlantic agreed to make additional commitments in connection with its application for section 271 approval.[48]

22. On April 6, 1998, Bell Atlantic filed a Pre-Filing Statement with the New York Commission, which contained a number of commitments, including: 1) to provide combinations of elements (including UNE-P as a minimum service offering); 2) to engage a third-party to test Bell Atlantic's OSS; and 3) to establish a self-effectuating system to prevent backsliding.[49] Pursuant to

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[42] Petition of New York Telephone Company for Approval of Its Statement of Generally Applicable Terms and Conditions Pursuant to Section 252 of the Telecommunications Act of 1996, Case 97-C-0271 (NYPSC Feb. 13, 1997) (Bell Atlantic Application App. C, Vol. 1, Tab 1).

[43] *See* Bell Atlantic Application App. C, Vol. 1, Tabs 1-110.

[44] New York Commission Comments at 9.

[45] *Id.*

[46] *Id.* at 10.

[47] *Id.* at 10.

[48] *Id.* at 10-11.

[49] *Id.* at 10-11

these commitments, Bell Atlantic obtained a comprehensive independent third-party test of its wholesale support systems and developed a plan to ensure adequate continuing wholesale performance.[50] As described above, this test was conducted by KPMG Peat Marwick and Hewlett Packard under the supervision of the New York Commission. Together, the New York Commission and KPMG created an open testing environment in which they consulted with interested parties, issued draft plans and reports, and reported in detail on issues of serious concern.[51] The problems identified through the test were addressed by Bell Atlantic through process improvements during the test period. The third-party test was completed with the release of KPMG's final report on August 6, 1999.[52] As noted above, Bell Atlantic filed its application with this Commission on September 29, 1999.

C. New York Commission and Department of Justice Evaluations

23. On October 18, 1999, the New York Commission submitted to this Commission its evaluation of Bell Atlantic's application. The New York Commission advised the Commission that, following two and half years of review, testing, and process improvements, Bell Atlantic-NY had met the checklist requirements of section 271(c). Specifically, New York stated that Bell Atlantic had met its obligation under section 271(c)(1)(A) by entering into more than 75 interconnection agreements approved by the New York Commission, and that competitive LECs are providing local exchange service in New York using their own facilities and those of Bell Atlantic. In addition, the New York Commission stated that the record developed in the New York proceeding establishes that Bell Atlantic has a legal obligation, under its interconnection agreements and state-approved tariffs, to provide the 14 items required under section 271's checklist, and that Bell Atlantic is meeting its legal obligation to provide those 14 items.[53]

24. On November 1, 1999, the Department of Justice filed its evaluation. Consistent with its approach in past applications, the Department stated that it considers whether all three entry paths contemplated by the 1996 Act – facilities-based entry involving construction of new networks, the use of unbundled elements of the BOC's network, and resale of the BOC's services – are fully and irreversibly open to competitive entry to serve both business and residential customers. [54] The Department of Justice found that "Bell Atlantic has completed most – but not all – of the actions needed to achieve a fully and irreversibly open market in New York."[55] The Department concluded that it did not have substantial concerns about the ability of facilities-based carriers and firms that wish to resell Bell Atlantic's retail services to enter the local telecommunications markets in New York. It also concluded that Bell Atlantic has made "great

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50 *Id.* at 10.

51 *See, e.g.*, Bell Atlantic Dowell/Canny Decl. at paras. 1-8; Department of Justice Evaluation at 4-5.

52 New York Commission Comments at 11-12.

53 *See id.* at 1. The New York Commission states that Bell Atlantic is providing a quality of wholesale service to competitors that is non-discriminatory. *Id.* at 7.

54 Department of Justice Evaluation at 7.

55 *Id.* at 1.

progress in opening the market to competition through the use of unbundled network elements," but two major areas of deficiency—OSS and access to local loops – remain as important obstacles to local competition.[56] The Department of Justice also concluded, however, that Bell Atlantic has not yet demonstrated that it can adequately provide access to unbundled local loops, either for traditional voice services or for digital subscriber line (DSL) technology used to provide a variety of advanced services.[57] Moreover, the Department expressed concern that Bell Atlantic's systems for handling orders for the unbundled network platform rely on manual processes that are prone to error and delay.[58] The Department expressly reserved judgment, however, on whether the facts in the record established compliance with the legal requirements of the competitive checklist or the Commission's rules.[59]

25. The Department of Justice stated its belief that its assessment of the facts regarding Bell Atlantic's wholesale performance was substantially consistent with the New York's assessment. The Department of Justice noted that, to the extent there is a difference between its evaluation and that of the New York Commission, "it arises largely from the Department's conclusion that needed improvements should be achieved before Bell Atlantic is authorized to provide interLATA services in New York, rather than relying on post-271 approval mechanisms to attempt to ensure such improvements."[60]

26. The Department urged us not to permit Bell Atlantic to offer interLATA services until "it demonstrates that it has solved the existing problems in its provision of access to unbundled network elements." It noted, however, that it "is possible that information from Reply Comments and *ex parte* submissions will provide additional support for Bell Atlantic's claims and justify a conclusion different from that reached by the Department on the basis of the current record." [61]

27. The Department of Justice stated that this Commission could properly deny this application. As an alternative, the Department suggested the Commission might be able to approve the application subject to carefully crafted conditions "under which Bell Atlantic would be permitted to offer interLATA services only after taking specified steps and demonstrating that its performance has met appropriate requirements."[62] The Department of Justice thus concluded that "the Commission may be able to approve Bell Atlantic's application at the culmination of

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56 *Id.* at 2.

57 *Id.*

58 *Id.* at 1-2.

59 *Id.* at 13 n.25.

60 *Id.* at 13-14.

61 *Id.* at 41.

62 *Id.* at 42-43.

these proceedings."[63]

28. On November 8, 1999, the New York Commission, and 23 other parties, filed reply comments in this proceeding. Both Bell Atlantic and the New York Commission contended that the arguments raised in opposition are insufficient grounds for denying the application.

III. ANALYTICAL FRAMEWORK

A. Absence of Unbundling Rules

29. It is necessary to clarify, for the purpose of evaluating this application, which network elements we expect Bell Atlantic to demonstrate that it provides on an unbundled basis, pursuant to section 251(c)(3) and checklist item 2. In the *Local Competition First Report and Order*, the Commission established a list of seven UNEs which incumbent LECs were obliged to provide: (1) local loops; (2) network interface devices; (3) local and tandem switching; (4) interoffice transmission facilities; (5) signaling networks and call-related databases; (6) operations support systems; and (7) operator services and directory assistance.[64] This obligation was codified in section 51.319 of the Commission's rules ("rule 319").[65] In January 1999, the Supreme Court vacated rule 319 and instructed the Commission to revise the standards under which the unbundling obligation is determined and to reevaluate the network elements subject to the unbundling requirement.[66]

30. Although the former rule 319 was not in force at the time Bell Atlantic filed its application in this proceeding, Bell Atlantic has sought to demonstrate that it provides nondiscriminatory access to these network elements.[67] Indeed, Bell Atlantic has stated that it believes it would be "reasonable" for the Commission to use the original seven network elements identified in former rule 319 in evaluating this application.[68] In assessing Bell Atlantic's argument, we begin from the premise that compliance with the competitive checklist requires that Bell Atlantic provide nondiscriminatory access to network elements, as contemplated by, and in accordance with, the requirements of sections 251(c)(3) and 251(d)(2). We believe that using the network elements identified in former rule 319 as a standard in evaluating Bell Atlantic's application, during the interim period between its vacation by the Supreme Court and the effective date of the new rules, is a reasonable way to ensure that the application complies with the

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[63] *Id.* at 43.

[64] *See Implementation of the Local Competition Prrovisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 15683 (1996) (*Local Competition First Report and Order*).

[65] 47 C.F.R. § 51.319.

[66] *AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999). In reaching this conclusion, the Court held that the Commission had not adequately considered the "necessary" and "impair" standards of section 251(d)(2) in establishing the list of seven network elements. *Id.* at 734-36.

[67] *See* Bell Atlantic Application at 15-26.

[68] *See* Letter from Susanne Guyer, Assistant Vice President, Bell Atlantic, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 99-295 (filed Dec. 6, 1999).

checklist requirements. We find it significant that no commenter has taken the position in this proceeding that Bell Atlantic *should not* be required to demonstrate that it provides these network elements. Accordingly, for the purposes of this application, we will evaluate whether Bell Atlantic provides nondiscriminatory access to the seven network elements identified under former rule 319.

31. We disagree with commenters that contend that Bell Atlantic must demonstrate, for the purposes of this application, compliance with the rules governing unbundled network elements recently established in the *UNE Remand* proceeding.[69] These new rules, among other things, specify which network elements an incumbent LEC is obliged to unbundle, and establish several new obligations that were not present under the former rule 319.[70] We recognize, however, that these new rules will not take effect until some time after release of this order.[71] Therefore, we will not require Bell Atlantic to prove that it currently complies with rules that have yet to take effect.[72] Moreover, we believe it would be inequitable to require Bell Atlantic to comply with these rules, particularly when no other incumbent LEC must comply before the effective date, just because Bell Atlantic has a section 271 application pending before the Commission. Of course, the Commission expects that Bell Atlantic will comply with the new *UNE Remand* rules once they take effect.

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[69] *See* Cable & Wireless Comments at 10-11; Comptel Comments at 10-16; RCN Comments at 8; *see also In the Matter of Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238 (rel. Nov. 5, 1999) (*Third Report and Order and Fourth Further Notice* or *UNE Remand Order*).

[70] For example, under the new rules, incumbent LECs will be required to provide unbundled access to certain network functionalities and elements that were not explicitly listed under the former rule 319, including dark fiber, subloops, inside wire, packet switching (in limited circumstances), certain databases and loop qualification information. *See Third Report and Order and Fourth Further Notice* at para. 526; 47 C.F.R. § 51.319. For similar reasons, we do not require Bell Atlantic to demonstrate that it complies with the new rules relating to unbundled network elements established in the Commission's recent advanced services order requiring "line sharing." *See Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 98-147 and 96-98, *Third Report and Order and Fourth Report and Order*, FCC 99-355 (rel. Dec. 9, 1999).

[71] Some of these rules will take effect 30 days after publication in the federal register, while others will take effect 120 days after federal register publication. *See Third Report and Order and Fourth Further Notice* at para. 526.

[72] In particular, we disagree with Comptel's argument that Bell Atlantic should be required to demonstrate compliance with the *UNE Remand* rules, even before they become effective, because these rules reflect and embody statutory requirements with which Bell Atlantic is required to comply under the terms of the competitive checklist. *See* Comptel Comments at 10-11 (arguing that the competitive checklist requires compliance with "the 1996 Act's obligations, separate and apart from the Commission's rules implementing the statute"); Letter from Robert J. Aamoth, Kelley Drye & Warren (on behalf of CompTel), to Magalie R. Salas, Secretary, Federal Communications Commission, CC Docket No. 99-295 at 4 (filed Dec. 10, 1999) (CompTel Dec. 10 *Ex Parte* Letter). Our review will ensure that Bell Atlantic meets the statutory requirements of section 271, including the competitive checklist. Moreover, as explained above, we believe that Bell Atlantic's approach of framing its application with reference to the unbundled network elements identified in the former rule 319 is a reasonable one.

B. Scope of Evidence in the Record

1. Procedural Framework

32. Section 271 proceedings are, at their core, adjudications that the Act requires the Commission to complete within ninety days of the application filing. The statute also requires us to consult with the Department of Justice and the relevant state commission in reviewing the application.

33. In the context of this statutory framework, the Commission has established procedural rules governing BOC section 271 applications.[73] Among other things, these rules provide an opportunity for parties other than the Department of Justice and the relevant state commission to comment on section 271 applications.

34. Under our procedural rules governing BOC section 271 applications, we expect that a section 271 application, as originally filed, will include all of the factual evidence on which the applicant would have the Commission rely in making its findings.[74] An applicant may not, at any time during the pendency of its application, supplement its application by submitting new factual evidence that is not directly responsive to arguments raised by parties commenting on its application.[75] This includes the submission, on reply, of factual evidence gathered after the initial filing. In an effort to meet its burden of proof, however, a BOC may submit new factual information after the application is filed, if the sole purpose of that evidence is to rebut arguments or facts submitted by other commenters.[76] The new evidence, however, must cover only the period placed in dispute by commenters and may, in no event, post-date the filing of the comments (*i.e.*, day 20).[77] In the event that the applicant submits new or post-dated evidence in replies or *ex parte* filings, we retain the discretion to start the 90-day review process anew or to accord such evidence no weight.[78]

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[73] *See, e.g., Procedures for Bell Operating Company Applications Under New Section 271 of the Communications Act*, Public Notice, 11 FCC Rcd 19708, 19711 (Dec. 6, 1996) (Dec. 6 Public Notice); *Revised Comment Schedule for Ameritech Michigan Application, as amended, for Authorization under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of Michigan*, Public Notice, DA 97-127 (Jan. 17, 1997) (Jan. 17, 1997 Public Notice); *Revised Procedures for Bell Operating Company Applications Under Section 271 of the Communications Act*, Public Notice, 13 FCC Rcd 17457 (Sept. 19, 1997) (Sept. 19, 1997 Public Notice).

[74] Sept. 19, 1997 Public Notice at Section B.

[75] *Id.; Ameritech Michigan Order,* 12 FCC Rcd at 20570-71.

[76] *Id.*

[77] Sept. 19, 1997 Public Notice at Section B; *Ameritech Michigan Order,* 12 FCC Rcd at 20570-71.

[78] *Ameritech Michigan Order*, 12 FCC Rcd at 20570 (citing Jan. 17, 1997 Public Notice). The Commission subsequently released a procedural public notice incorporating this policy for future 271 applications; *see* Sept. 19 Public Notice at Section B. *See also Comments Requested on Application by Bell Atlantic for Authorization under Section 271 of the Communications Act to Provide In-Region, InterLATA service in the State of New York*, Public Notice, DA 99-2014 (rel. Sept. 29, 1999) (Sept. 29 Public Notice).

35. This precedent has served the Commission well, by deterring incomplete filings from the BOCs. In particular, the rule is designed to prevent applicants from presenting part of their initial *prima facie* showing for the first time in reply comments.[79] The rule has enabled us properly to manage our own internal consideration of the application and ensures that commenters are not faced with a "moving target" in the BOC's section 271 application. We continue to believe, as a general matter, that it is highly disruptive to our processes to have a record that is constantly evolving. We emphasize, however, that our precedent makes clear that this rule is a discretionary one.[80]

36. We do not expect that a BOC, in its initial application, will anticipate and address every foreseeable argument its opponents might make in their subsequent reply comments, but we have previously stated that a BOC must address in its initial application all facts that the BOC can reasonably anticipate will be at issue. Through state proceedings, BOCs should be able reasonably to identify and anticipate certain arguments and allegations that parties will make in their filings before the Commission.[81]

37. In addition, the Commission has found that a BOC's promises of *future* performance to address particular concerns raised by commenters have no probative value in demonstrating its *present* compliance with the requirements of section 271.[82] In order to gain in-region, interLATA entry, a BOC must support its application with actual evidence demonstrating its present compliance with the statutory conditions for entry, instead of prospective evidence that is contingent on future behavior. Thus, we must be able to make a determination based on the evidence in the record that a BOC has actually demonstrated compliance with the requirements of section 271.

2. Motions To Strike

38. On November 22, 1999, AT&T filed a motion to strike or to disregard portions of the reply submissions of Bell Atlantic and the New York Commission filed in this proceeding.[83]

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[79] *Ameritech Michigan Order*, 12 FCC Rcd at 20573.

[80] *See Ameritech Michigan Order*, 12 FCC Rcd at 20570 ("[I]f a BOC chooses to submit such evidence . . . we reserve the discretion . . . to accord the new evidence no weight in making our determination."); *id.*at para. 54 ("[W]e find that using our discretion to accord BOC submissions of new factual evidence no weight will ensure that our proceedings are conducted in 'such manner as will best conduce to the proper dispatch of business and to the ends of justice."); *id.*at para. 57 ("By retaining the discretion to accord new evidence no weight . . . "); *id.* at para. 59 ("Because we will exercise our discretion in determining whether to accord new factual evidence any weight, we deny [the motion to strike."]; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20674 ("Given the complexity of this data and the fact that interested parties have not had an opportunity to address it, we exercise our discretion to accord the information minimal weight."); Dec. 10 Public Notice at 1 ("[I]f parties choose to submit new evidence, [the Commission] retains the discretion to accord new evidence no weight.").

[81] *Ameritech Michigan Order*, 12 FCC Rcd at 20575.

[82] *Id.* at 20573-74.

[83] *See* Motion of AT&T Corp. to Strike or to Disregard Portions of the Reply Submissions of Bell Atlantic and of the New York Public Service Commission (filed Nov. 22, 1999) (*AT&T Motion to Strike*).

AT&T argues that reply submissions of both Bell Atlantic and the New York Commission contain material that must be stricken or accorded no weight under the Commission's rules because they post-date Bell Atlantic's application and the due date for comments.[84] In addition, AT&T argues that Bell Atlantic's reply submission contains numerous new promises of future performance.[85]

39. We deny AT&T's motion because we do not rely, as a basis for our decision, on: (1) evidence submitted by Bell Atlantic after filing its application, unless such evidence both relates to events that occurred prior to the comment filing date (October 19, 1999) and is directly responsive to allegations in the record; (2) evidence submitted by the New York Commission that post-dates the comment due date; or (3) Bell Atlantic's promises of future compliance.

40. On December 17, 1999, Covad filed a motion to strike an *ex parte* submission filed by Bell Atlantic on December 10, 1999.[86] We deny Covad's motion because we do not rely on Bell Atlantic's *ex parte* submission as a basis for our decision.

3. *Ex Parte* Submissions

41. Under the procedural rules governing section 271 applications, we strongly encourage parties to set forth their views comprehensively in their formal submissions (i.e., Brief in Support, oppositions, supporting comments, etc.), and not to rely on subsequent *ex parte* presentations. At the same time, the Commission expressly provided that parties may file *ex partes*. Our procedural Public Notice thus clearly contemplates that parties may file written *ex partes*, when appropriate, to clarify the record.[87] We take this opportunity to clarify that like reply comments, *ex partes* must be directly responsive to arguments raised by parties commenting on the application. Such *ex partes* may, however, elaborate on, or provide additional explanation or detail in response to requests from Commission staff or in direct response to post-reply *ex parte* filings.[88]

42. Nothing in our procedural rules or past precedent precludes the Commission and the staff from requesting clarification or an explanation about information or data contained in the filings specified above. Indeed, our procedural Public Notice expressly recognizes that the Commission may request additional information from the applicant, as the page limit for *ex partes*

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[84] *Id.* at 1-7.

[85] *Id.* at 7.

[86] Comments of Covad and Motion to Strike, CC Docket No. 99-295 (filed Dec. 17, 1999); Letter from Thomas J. Tauke, Senior Vice President – Government Relations, Bell Atlantic, to William E. Kennard, Chairman, Federal Communications Commission, CC Docket No. 99-295 (filed Dec. 10, 1999) (Bell Atlantic Dec. 10 *Ex Parte* Letter).

[87] Sept. 19 Public Notice at Section H. Section H of the Public Notice establishes page limitations for *ex partes*, subject to certain exceptions.

[88] *See* Letter from Dee May, Director, Federal Regulatory Group, Bell Atlantic to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 99-295 at 2 (filed Dec. 16, 1999).

does not apply to written material filed in response to direct requests from Commission staff.[89] It is critical to the agency's deliberative process that the Commission and staff fully understand the evidence and arguments presented in the BOC's section 271 application, arguments raised in opposition, and responses made by parties on reply. Accordingly, the Commission retains the discretion to request additional information from the applicant or other parties that elaborates on positions set forth in the original application, comments, or reply comments.[90] We emphasize that we are not departing from our view that the applicant should set forth its position in a clear and concise manner in its formal filings. However, it is imperative that, as part of the Commission's deliberative process, we have the ability to engage in an ongoing dialogue with parties to ensure that we have a clear and accurate understanding of the information contained in all formal submissions.

C. Framework for Analyzing Compliance with Statutory Requirements

43. In this section, we discuss two aspects of the framework for analyzing compliance with the statutory requirements of section 271. First, we discuss the legal standards we have enunciated in past orders for determining whether a BOC is meeting the statutory nondiscrimination requirements. Second, we discuss the evidentiary requirements of a BOC's section 271 application and, in particular, the types of showings we will find probative in deciding whether a BOC has met the statutory standards.

1. Legal Standard

44. In order to comply with the requirements of section 271's competitive checklist, a BOC must demonstrate that it has "fully implemented the competitive checklist in subsection (c)(2)(B)."[91] In particular, the BOC must demonstrate that it is offering interconnection and access to network elements on a nondiscriminatory basis.[92] Previous Commission orders addressing section 271 applications have elaborated on this statutory standard. First, for those functions the BOC provides to competing carriers that are analogous to the functions a BOC provides to itself in connection with its own retail service offerings, the BOC must provide access to competing carriers in "substantially the same time and manner" as it provides to itself. Thus, where a retail analogue exists, a BOC must provide access that is equal to (*i.e.*, substantially the same as) the level of access that the BOC provides itself, its customers, or its affiliates, in terms of quality, accuracy, and timeliness.[93] For those functions that have no retail analogue, the BOC must demonstrate that the access it provides to competing carriers would offer an efficient carrier a "meaningful opportunity to compete."[94] As we stated in the *Ameritech Michigan Order*, there

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89 *Id.*

90 Consistent with section 1.1204(a)(b), responses to Commission inquiries will generally be placed in the record. 47 C.F.R § 1.204(a)(b).

91 *Ameritech Michigan Order*, 12 FCC Rcd at 20599.

92 47 U.S.C. § 271(c)(1)(B)(i), (ii).

93 *Ameritech Michigan Order*, 12 FCC Rcd at 20618-19.

94 *Id.*

may be situations in which a BOC contends that, although equivalent access has not been achieved for an analogous function, the access that it provides is still nondiscriminatory within the meaning of the statute.[95]

45. We do not view the "meaningful opportunity to compete" standard to be a weaker test than the "substantially the same time and manner" standard. Where the BOC provides functions to its competitors that it also provides for itself in connection with its retail service, its actual performance can be measured to determine whether it is providing access to its competitors in "substantially the same time and manner" as it does to itself. Where the BOC, however, does not provide a retail service that is similar to its wholesale service, its actual performance with respect to competitors cannot be measured against how it performs for itself because the BOC does not perform analogous activities for itself. In those situations, our examination of whether the quality of access provided to competitors offers competitors "a meaningful opportunity to compete" is intended to be a proxy for whether access is being provided in substantially the same time and manner and, thus, nondiscriminatory.

46. Finally, we note that a determination of whether the statutory standard is met is ultimately a judgment we must make based on our expertise in promoting competition in local markets and in telecommunications regulation generally. We have not established, nor do we believe it appropriate to establish, specific objective criteria for what constitutes "substantially the same time and manner" or a "meaningful opportunity to compete." We look at each application on a case-by-case basis and consider the totality of the circumstances, including the origin and quality of the information before us, to determine whether the nondiscrimination requirements of the Act are met. Whether this legal standard is met can only be decided based on an analysis of specific facts and circumstances.

2. Evidentiary Case

47. We previously have set forth the analytical framework that we use in assessing whether a BOC has demonstrated compliance with the statutory requirements of section 271.[96] At the outset, we reemphasize that the BOC applicant retains at all times the ultimate burden of proof that its application satisfies all of the requirements of section 271, even if no party files comments challenging its compliance with a particular requirement.[97]

48. The evidentiary standards governing our review of section 271 applications are intended to balance our need for reliable evidence against our recognition that, in such a complex endeavor as a section 271 proceeding, no finder of fact can expect proof to an absolute certainty. While we expect the BOC to demonstrate as thoroughly as possible that it satisfies each checklist item, the public interest standard, and the other statutory requirements, we reiterate that the BOC needs only to prove each element by "a preponderance of the evidence," which generally means

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95 *Ameritech Michigan Order*, 12 FCC Rcd at 20619 n.345.

96 *See supra* paras. 44-46.

97 *Ameritech Michigan Order*, 12 FCC Rcd at 20567-68; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20635-36.

"the greater weight of evidence, evidence which is more convincing that the evidence which is offered in opposition to it."[98]

49. As we held in the *Second BellSouth Louisiana Order*, we first determine whether the BOC has made a *prima facie* case that it meets the requirements of a particular checklist item. The BOC must plead, with appropriate supporting evidence, facts which, if true, are sufficient to establish that the requirements of section 271 have been met. Once the BOC has made such a showing, opponents must produce evidence and arguments to show that the application does not satisfy the requirements of section 271, or risk a ruling in the BOC's favor.[99]

50. When considering commenters' filings in opposition to the BOC's application, we look for evidence that the BOC's policies, procedures, or capabilities preclude it from satisfying the requirements of the checklist item. Mere unsupported evidence in opposition will not suffice.[100] Although anecdotal evidence may be indicative of systemic failures, isolated incidents may not be sufficient for a commenter to overcome the BOC's *prima facie* case. Moreover, a BOC may overcome such anecdotal evidence by, for example, providing objective performance data that demonstrate that it satisfies the statutory nondiscrimination requirement.

51. We will look to the state to resolve factual disputes wherever possible. Indeed, we view the state's and the Department of Justice's role to be one similar to that of an "expert witness." Given the 90-day statutory deadline to reach a decision on a section 271 application, the Commission does not have the time or the resources to resolve the enormous number of factual disputes that inevitably arise from the technical details and data involved in such a complex endeavor. Accordingly, as discussed above,[101] where the state has conducted an exhaustive and rigorous investigation into the BOC's compliance with the checklist, we may give evidence submitted by the state substantial weight in making our decision. Although we are statutorily required to accord substantial weight to the Department of Justice's evaluation, in appropriate circumstances, we may conclude that the evidence submitted by a state commission is more persuasive than that submitted by the Department of Justice, particularly if the state has conducted a rigorous analysis of the evidence.

52. To make a *prima facie* case that the BOC is meeting the requirements of a particular checklist item under section 271(c)(1)(A), the BOC must demonstrate that it is providing access or interconnection pursuant to the terms of that checklist item. In particular, a BOC must demonstrate that it has a concrete and specific legal obligation to furnish the item upon request pursuant to state-approved interconnection agreements that set forth prices and other terms and conditions for each checklist item, and that it is currently furnishing, or is ready to

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[98] *Ameritech Michigan Order*, 12 FCC Rcd at 20568-69; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20638-39.

[99] *See Second BellSouth Louisiana Order*, 13 FCC Rcd at 20638-39.

[100] *See Ameritech Michigan Order*, 12 FCC Rcd at 20569 (concluding that greater weight will be attached to comments and pleadings supported by an affidavit or sworn statement than to an unsupported contrary pleading).

[101] *See supra* paras. 43-46.

furnish, the checklist item in quantities that competitors may reasonably demand and at an acceptable level of quality.[102]

53. The particular showing required to demonstrate compliance will vary depending on the individual checklist item and the circumstances of the application. We have given BOCs substantial leeway with respect to the evidence they present to satisfy the checklist. Although our orders have provided guidance on which types of evidence we find more persuasive, "we reiterate that we remain open to approving an application based on other types of evidence if a BOC can persuade us that such evidence demonstrates nondiscriminatory treatment and other aspects of the statutory requirements."[103] In past orders we have encouraged BOCs to provide performance data in their section 271 applications to demonstrate that they are providing nondiscriminatory access to unbundled network elements to requesting carriers.[104] We have concluded that the most probative evidence that a BOC is providing nondiscriminatory access is evidence of actual commercial usage.[105] Performance measurements are an especially effective means of providing us with evidence of the quality and timeliness of the access provided by a BOC to requesting carriers.

54. A number of state commissions, including New York, have established a collaborative process through which they have developed, in conjunction with the incumbent and competing carriers, a set of measures, or metrics, for reporting of performance in various areas.[106] Through such collaborative processes, New York has also adopted performance standards for certain functions, typically where there can be no comparable measure based on the incumbent LEC's retail performance. We strongly encourage this type of process, because it allows the technical details that determine how the metrics are defined and measured to be worked out with the participation of all concerned parties. We also strongly support the efforts of state commissions to build and oversee a process that ensures the development of local competition

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[102] *Ameritech Michigan Order*, 12 FCC Rcd at 20601-02.

[103] *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20638-39.

[104] *See, e.g., Second BellSouth Louisiana Order*, 13 FCC Rcd at 20658-59; *Application by BellSouth Corp. et al. Pursuant to Section 271 of the Communications Avt of 1934, as amended, to Provide In-Region, InterLATA Services in Louisiana*, CC Docket No. 97-231, Memorandum Opinion and Order, *BellSouth Louisiana Order*, 13 FCC Rcd 6245, 6258-81 (1998) (*First BellSouth Louisiana Order*); *Application by BellSouth et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide InterLATA Services in South Carolina*, CC Docket No. 97-208, Memorandum Opinion and Order,13 FCC Rcd 539, 597-634 (BellSouth *South Carolina Order*); *Ameritech Michigan Order*, 12 FCC Rcd at 20627-52.

[105] *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20655; *Ameritech Michigan Order*, 12 FCC Rcd at 20618.

[106] In our *Performance Measurements NPRM* we proposed a model set of reporting requirements that states could adopt to measure whether an incumbent LEC is providing interconnection, resale, and unbundled network elements on nondiscriminatory terms. *Performance Measurements and Reporting Requirements for Operaions Support Systems, Interconnection, and Operator Services and Directory Assistance*, CC Docket No. 98-56, Notice of Proposed Rulemaking, 13 FCC Rcd 12817 (rel. Apr. 17, 1998) (*Performance Measurements NPRM*). This Commission has not, however, adopted, as a federal requirement, a particular set of metrics or performance standards.

that Congress intended. An extensive and rigorous evaluation of the BOC's performance by the states provides greater certainty that barriers to competition have been eliminated and the local markets in a state are open to competition.

55. We caution, however, that adoption by a state of a particular performance standard pursuant to its state regulatory authority is not determinative of what is necessary to establish checklist compliance under section 271. We recognize that metric definitions and incumbent LEC operating systems will likely vary among states, and that individual states may set standards at a particular level that would not apply in other states and that may constitute more or less than the checklist requires. Therefore, it is unlikely that we will see uniform standards that measure precisely the same BOC conduct across states. At the same time, for functions for which there are no retail analogues, and for which performance benchmarks have been developed with the ongoing participation of affected competitors and the BOC, those standards may well reflect what competitors in the marketplace feel they need in order to have a meaningful opportunity to compete.[107]

56. We emphasize that, because the Commission is statutorily required to determine checklist compliance, we must independently evaluate whether a BOC is fulfilling the nondiscrimination requirements of section 271. Nevertheless, in making our evaluation we will examine whether the state commission has adopted a retail analogue or a benchmark to measure BOC performance and then review the particular level of performance the state has required. If the state commission has made these determinations in the type of rigorous collaborative proceeding described above, we are much more likely to find that they are reasonable and appropriate measures of parity. Accordingly, we are inclined to rely on such standards and measurements in our own analysis but may reach a different conclusion where justified.

57. In the instant proceeding, for example, the New York Commission has determined, through a collaborative process with input from Bell Atlantic and competing carriers, that there are retail analogues for certain functions and performance benchmarks for others. We find this to be a reasonable basis for us to begin our analysis.[108] Under the framework adopted by the New York Commission, Bell Atlantic determines whether any difference in its performance compared to its retail operations is statistically significant, and provides a figure indicating the degree of statistical significance.[109] For measures where the New York Commission has set a performance benchmark, the New York Commission has required Bell Atlantic to provide the metrics for its performance to competing carriers, which can then be compared to the benchmark.

58. In this case, we conclude that to the extent there is no statistically significant difference between Bell Atlantic's provision of service to competitive LECs and its own retail

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[107] We also recognize that states may choose to set their performance benchmarks at levels higher than what is necessary to meet the statutory nondiscrimination standard.

[108] We do not suggest that these New York standards represent absolute maximum or minimum levels of performance necessary to satisfy the competitive checklist. Rather, we conclude that, in the context of this proceeding, they fall within a zone of reasonableness.

[109] *See infra* Appendix B for further discussion of the statistical methodology used by Bell Atlantic.

customers, we need not look any further.[110] Similarly, if there is no difference between the Bell Atlantic provision of service to competitive LECs and the performance benchmark, our analysis is done.

59. To the extent there is any statistically significant difference between Bell Atlantic's provision of service to competitive LECs and retail customers or an apparent difference between its provision of service to competitive carriers and the performance benchmarks set by the New York Commission, we will examine the evidence further to make a determination whether the statutory nondiscrimination requirements are met. Thus, we will examine the explanation that Bell Atlantic and other commenters provide about whether these differences provide an accurate depiction of the quality of Bell Atlantic's performance. For instance, we may examine the data on a more disaggregated level, in order to evaluate arguments made by Bell Atlantic that competitive LEC error, or differences in the composition of competitive LEC orders, or sudden changes in the quantity or timing of orders made by competitive LECs, are responsible for the apparent poor performance. We also may examine how many months a variation in performance has existed and what the trend has been in recent months. A steady improvement in performance over time may provide us with an indication that problems are being resolved. It may also provide us with evidence as to whether Bell Atlantic's systems are scaleable and can handle large volumes of orders for services. Finally, in some instances, we may find that statistically significant differences in measured performance may exist, but that such differences have little or no competitive significance in the marketplace. As such, we may deem such differences non-cognizable under the statutory standard.

60. The determination of whether a BOC's performance meets the statutory requirements necessarily is a contextual decision based on the totality of the circumstances and information before us. There may be multiple performance measures associated with a particular checklist item, and an apparent disparity in performance for one measure, by itself, may not provide a basis for finding noncompliance with the checklist. Other measures may tell a different story, and provide us with a more complete picture of the quality of service being provided. Thus, whether we are applying the "substantially same time and manner" standard or the "meaningful opportunity to compete" standard, we will examine whether the differences in the measured performance are large enough to be deemed discriminatory under the statute.

IV. COMPLIANCE WITH SECTION 271 (C)(1)(A)

A. Background

61. In order for the Commission to approve a BOC's application to provide in-region, interLATA services, a BOC must first demonstrate that it satisfies the requirements of either section 271(c)(1)(A) (Track A) or 271(c)(1)(B) (Track B).[111] To qualify for Track A, a BOC must have interconnection agreements with one or more competing providers of "telephone

[110] We would have a high level of confidence that any differences in performance are the result of random chance.

[111] 47 U.S.C. § 271(d)(3)(A).

exchange service . . . to residential and business subscribers."[112] The Act states that "such telephone service may be offered . . . either exclusively over [the competitor's] own telephone exchange service facilities or predominantly over [the competitor's] own telephone exchange facilities in combination with the resale of the telecommunications services of another carrier."[113] The Commission concluded in the *Ameritech Michigan Order* that, when a BOC relies upon more than one competing provider to satisfy section 271(c)(1)(A), each carrier need not provide service to both residential and business customers.[114]

B. Discussion

62. We conclude that Bell Atlantic demonstrates that it satisfies the requirements of Track A based on the interconnection agreements it has implemented with competing carriers in New York. Specifically, we find that AT&T, MCI WorldCom, and Cablevision Lightpath provide telephone exchange service either exclusively or predominantly over their own facilities to residential subscribers and to business subscribers.[115] The New York Commission also concludes that Bell Atlantic has met the requirements of section 271(c)(1)(A).[116] None of the commenting parties, including the competitors cited by Bell Atlantic in support of its showing, challenge Bell Atlantic's assertion in this regard. Thus, Bell Atlantic meets the requirements of section 271(c)(1)(A).

V. COMPLIANCE WITH CHECKLIST

A. Checklist Item 1 – Interconnection

1. Non-Pricing Aspects of Interconnection

a. Background

63. Section 271(c)(2)(B)(i) of the Act requires a section 271 applicant to provide "[i]nterconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1)."[117]

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[112] 47 U.S.C. § 271(c)(1)(A).

[113] *Id.*

[114] *Ameritech Michigan Order*, 12 FCC Rcd at 20589. *See also Second BellSouth Louisiana Order*, 13 FCC Rcd 20633-35.

[115] *See* Bell Atlantic Application at 4-8. The figures cited by Bell Atlantic in support of this assertion are subject to the confidentiality provisions set forth as part of the Public Notice seeking comments in this proceeding. *Comments Requested on Apllication by Bell Atlantic For Authorization Under Section 271 of the Communications Act to Provide In-Region InterLATA Service in the State of New York*, Public Notice (Sept. 29, 1999). Parties wishing to review these figures should comply with the confidentiality provisions of the Public Notice.

[116] New York Commission Comments at 13-14. Although the Department of Justice does not address business and residential subscribers separately, it states that 59 percent of all competitive LEC access lines in New York are served on a facilities basis. *See also* Department of Justice Evaluation at 9; CWA Reply at 4-6.

[117] 47 U.S.C. § 271(c)(2)(B)(i); *see Second BellSouth Louisiana Order*, 13 FCC Rcd at 20640-20642; *Ameritech Michigan Order*, 12 FCC Rcd at 20662-63.